Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 80-130

SUPREME COURT OF THE UNITED STATES

October Term, 1980

HAL WALLS, JR.,
Petitioner

v.

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COULMBIA

HAL WALLS, JR., Pro se
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Clinton, Maryland 20735
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QUESTIONS PRESENTED

1. Whether the due process requirement of the 5th amendment of the United States Constitution was afforded Petitioner when the District of Columbia Board of Zoning Adjustment knew that Petitioner never received actual, personal notice of the Board's Order and then claimed Petitioner's request for a rehearing and subsequent appeal were untimely.

2. Whether Petitioner's petition for review by the Court of Appeals of the District of Columbia was timely filed, pursuant to D.C. App. R. 15(b) requiring that the petition be filed within fifteen (15) days from the date Petitioner had formal notice; Petitioner having filed within fifteen (15) day time period after receiving actual notice of the District of Columbia Board of Zoning Adjustment's decision in his case.

3. Whether the Court of Appeals of the District of Columbia had jurisdiction of Petitioner's case.

4. Whether the exclusion by the District of Columbia Board of Zoning Adjustment of a Law and Real Estate Office in the 4600 block of Georgia Avenue in the District of Columbia (1) has no rational basis, (2) offends the principles of equal protection of the laws; and is thus violative of the United States Constitution, and (3) is inconsistent with the Board's acquiescence in the change of character Georgia Avenue has undergone over the years.

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March 18, 1980

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OPINION BELOW

The opinion of the Court of Appeals of the District of Columbia appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals of the District of Columbia was entered on March 18, 1980. A timely petition for rehearing was denied on April 29, 1980. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

RULE AND CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V to the United States provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment /formal charge/ or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for

the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

DISTRICT OF COLUMBIA APPELLATE RULES 15(b), (c) /D.C. App. R 15(b), (c)/ provide:

Review of orders and decisions of an agency shall be obtained by filing with the clerk of this court a petition for review within 15 days from the date of having been given formal notice of the order or decision sought to be reviewed.

The running of the time for filing a petition for review is terminated as to all parties by the timely filing pursuant to the rules of the agency of a petition for rehearing or reconsideration and the full time for filing a petition for review as fixed by subdivision (b) of this rule

commences to run and is to be computed from the date of the order denying said petition.

STATEMENT OF THE CASE

In October 1977, Petitioner located a large, detached property situated at 4604 Georgia Avenue, N.W., in the District of Columbia, for sale by a local realtor. At that time the property was in a severe state of disrepair, was boarded up and had a large commercial-type sign hanging on its front. The sign indicated that the property had been used as a commercial establishment, as a Music and Arts Studio (Photographs are in Record below).

Petitioner and his wife purchased the property in January of 1978 to remodel for use as their law office and real estate office. Georgia Avenue is primarily a commercial strip, running north and south in the District of Columbia. It is a main artery of the city, providing ingress and egress to and from

Maryland.

After significant repairs were made, Petitioner applied for a certtificate of occupancy. By letter, from the Zoning Review Branch, dated August 31, 1978, a certificate of occupancy was denied. That letter was sent to Petitioner by certified mail. Petitioner never received the letter at his residence. Petitioner went to the office of the Zoning Review Branch and was given the letter, still sealed in the envelope and marked "Unclaimed." This event consituted the beginning of a series of difficulties which Petitioner experienced in connection with his application for zoning relief of his property; specifically Petitioner's difficulty with receiving any certified mail at his residence. It is that difficulty with the mail system that is crucial to Petitioner's case.

In the letter, dated August 31, 1978, a certificate of occupancy was denied. The letter advised Petitioner to seek a variance

from the use provisions as provided by §8720.11 of the Code of the District of Columbia.

Petitioner made application to the Board of Zoning Adjustment for a variance from the use provisions to permit the use of the first and second floors of Petitioner's property as a law office (on the first) and a real estate office (on the second). Separate entrances were to be used for the two offices. Petitioner complied with the requisite formalities of the Board prior to its hearing, held October 25, 1978. The application was denied by Final Order, dated December 8, 1978. The Board never indicated to Petitioner when he could expect a decision in his case. The Petitioner had no reason to know when the Board would reach its decision , nor when it would send notice thereof. The Board of Zoning Adjustment has a record of postponing meetings and delaying its decisions. Petitioner, therefore, had no information as to when the

Order of the Board, in his case, would be sent to him. Petitioner did not know and had no reason to know the means by which that notice would be sent in the mail (i.e. by regular mail, certified mail, registered mail, etc.). The Board asserts that it sent notice of that Order to Petitioner by certified mail to his residence. The Board further asserts that Petitioner purposely left the letter at the post office because Petitioner knew the letter was from the Board. Contradicting the Board's assertion, however, is the fact that even when notices are left by a postman, indicating there is certified mail awaiting an individual, there is no indication from whom the mail has been sent. Petitioner, however, never received the letter, nor any notices from the postman of certified mail waiting for him.

After receiving no notice of the Board's decision, on or about January 2, 1979, Petitioner telephoned the Board's office,

requesting what, if any, decision had been made in his case. Petitioner was informed that his petition had been denied. That was the first information Petitioner had received about his case subsequent to the hearing.

On the same day of Petitioner's call, Petitioner followed up the call by writing a letter to the Board of Zoning Adjustment requesting a reconsideration of the decision. The Board treated the letter as a Motion for Reconsideration. The Board denied the reconsideration on March 26, 1979, stating (1) it was not timely and (2) it failed to state an acceptable basis of error.

Once again, after making a decision on the reconsideration of Petitioner's case, the Board asserted that a certified letter was sent to Petitioner's residence. Petitioner never received that letter, nor any postman's notice that such a letter awaited him at the Clinton Post Office. The sequence of events following were almost identical to the first

occurrence set forth above. As before, Petitioner had no reason to know when the Board or by what means the Board would notify Petitioner of its decision. Petitioner had never received the first certified letter. The second certified letter contained in it information that the Board's first order was sent by certified mail. That was Petitioner's first indication that the Board used certified mail as its means for sending the first notice of its Order. All Petitioner had previously known from his call to the Board's office was that notice had been mailed to him (the person with whom he spoke at the office never mentioned the letter had been sent by certified mail).

After receiving no information as to his letter requesting reconsideration, Petitioner phoned the Board's office once again to inquire if a decision had been made in his case. That phone call was made in February of 1979, a month after the Petitioner's

letter requesting reconsideration had been sent to the Board. Petitioner wanted to make certain he would know of the decision so that a timely appeal could be filed if the decision was adverse. During Petitioner's February call he was informed that the February 1979 meeting of the Board had been cancelled and that Petitioner's case might be heard at the March meeting. Petitioner waited to receive notice of a decision on his request for reconsideration. When he received no notice from the Board during the month of March, Petitioner waited a period of time and then called the Board's office a third time. Petitioner was informed that his request for reconsideration had been denied. Following the phone call, Petitioner received a letter by ordinary mail on April 21, 1979.

Based on the April 21, 1979 letter, Petitioner filed an appeal in the District of Columbia Court of Appeals. The Petition for Review in the Court of Appeals was dis-

missed for lack of jurisdiction, with the Court asserting that the Petition was not timely filed. Notice of the decision of the Court of Appeals was sent by ordinary mail and was received by Petitioner in time for him to file a timely Petition for Rehearing by the Court of Appeals. That Petition was denied on April 29, 1980. The notice of that decision was sent by ordinary mail and was received by Petitioner allowing him to file a timely Petition for Certiorari in the Supreme Court of the United States.

Petitioner raised the constitutional question involving the equal protection of laws, applicable to the District of Columbia through the "due process" clause of the amendment, in his Request for Reconsideration by the Board of Zoning Adjustment. The question was again raised in the Petition for Review by the Court of Appeals. At the hearing, on the appeal, Petitioner raised the

"due process" requirement concerning notice, with regard to the timeliness of his Request for Reconsideration and his subsequent appeal to the District of Columbia Court of Appeals.

Crucial in this case are the following facts:

1. Each time certified mail was sent to Petitioner by the Board of Zoning Adjustment, Petitioner failed to receive it.

2. Each time ordinary mail was sent to Petitioner, he did receive it without delay. That included letters from the Board of Zoning Adjustment and from the Court of Appeals.

3. Critical to Petitioner's case was receipt of notices of all Orders in his case, to afford Petitioner opportunity to exhaust all of his remedies in this matter; and to afford him due process.

4. Denial of Petitioner's right to be heard on the merits by the Court of Appeals, denied Petitioner the opportunity to effectively

demonstrate the the violation by the District of Columbia Board of Zoning Adjustment of the equal protection of the laws (Petitioner did have oral argument before the Court of Appeals, however of primary concern to that Court was the jurisdictional question. Satisfied that the Court lacked jurisdiction to hear the case, the Court permitted Petitioner to discuss the zoning issues. The Court's decision, however reflects the fact that the merits of the case were of little importance in that the Court lacked jurisdiction. The Court addressed Petitioner on the notice issue, at the hearing, but offered little or no question or comment on the zoning issues. Petitioner was thus denied a fair opportunity to present the zoning issues to the Court).

It is from the decision of the Court of Appeals of the District of Columbia that Petitioner now seeks review by the Supreme Court.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT BELOW WAS IMPROPERLY BASED ON CASE LAW INVOLVING FACTS AND CIRCUMSTANCES INAPPLICABLE TO PETITIONER'S CASE AND FAILED TO ADEQUATELY ADDRESS A KEY ISSUE IN THE CASE (WHEN THE PETITIONER RECEIVED NOTICE FOR THE PURPOSE OF FILING A TIMELY REQUEST FOR RECONSIDERATION AND A TIMELY APPEAL). THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE ISSUE OF TIMELY NOTICE.

The District of Columbia Court of Appeals used as its authority for dismissing Petitioner's appeal, Valentine v. Real Estate Commission, D.C. App., 163 A. 2d 554. 556 (1960). In that case the petition for review was filed one day late and the Court rule, "we have no discretion except to dismiss the appeal." Reference was also made to In re C.I.T. and C.M.T., D.C. App., 369 A. 2d 171, 172 (1977). Neither case is applicable to the instant facts. Neither

of those cases dealt with the problem of notice which is the crucial element of Petitioner's case. Petitioner's case turns on that point. Undecided in the instant case is which date can be considered as the date Petitioner received notice of the various decisions and orders in his case. That can only be decided after the question of what constituted notice is appropriately considered. The Court of Appeals never considered that issue. That must be decided in order to determine the timeliness of Petitioner's appeal to the Court of Appeals.

One of the leading cases dealing with the issue of notice is Johnson v. Barreiro, 59 Cal. App. 2d 213 (1943). The case made a distinction between the mailing of a notice and the receipt of that notice. It was necessary, in that case, to refer to an applicable statute to determine whether notice was effective upon mailing or upon receipt. In Johnson the Court found that a notice, although mailed on the 31st day of December,

was not effective until it was actually received on January 2d.

In General Factors, Inc. v. Beck, 402 P. 2d 221 (1965), the Court of Appeals of Arizona recited the well-established rule, "that in the absence of custom, statute or express contract, a notice sought to be served by mail is not effective until it comes into the hands of the one sought to be served." It cited as authority the Johnson case, as well as cases of the highest courts of Massachusetts, Oklahoma and Arizona. Regan v. Atlantic Refining Co, 304 Mass. 353, 23 N.E. 2d 289; George v. Abramson, 184 Okl. 289, 86 P. 2d 980, School District No. 6 of Pima County v. Barber, 85 Ariz. 95, 332 P. 2d 496 (1958).

In the General Factors case a bookkeeper of the defendant had received the involved notice, however the defendant had not received the information, therein, actually and personally until some time later. The Court found that defendant did not have notice until he, person-

ally, had actual receipt and knowledge of the contents.

The Massachusetts Supreme Judicial Court ruled, in O'Neil v. City of Boston, 257 Mass. 414 (1926), that mere mailing of a notice was insufficient. The facts of the O'Neil case bear a strong similarity to the facts of the instant case. In O'Neil there was a requirement that notice be received within ten days. Notice in that case was sent by registered mail on the tenth day, but did not actually come into the hands of the recipient until the eleventh day. The Massachusetts court ruled that mere mailing of the notice was not sufficient. The notice must be actually received within the ten day period.

Additionally, in Margaret Regan v. Atlantic Refining Company, 304 Mass. 351 (1939), it was held, "In the absence of express provisions to the contrary, a notice is not given until received by the person to be notified."

In the instant case, Petitioner has persistently contended, at each stage of the proceedings, that he did not receive the certified letters mailed to him from the Board of Zoning Adjustment. On each of the involved occasions, when Petitioner failed to receive notice of the decisions, he exercised a good faith effort to keep informed of his case by calling the Board of Zoning Adjustment. Each time the subsequent letters were sent from the Board's office, by regular mail, Petitioner received those letters at the same address without any problem (these were the letters sent as a follow-up to Petitioner's calls to the Board office). Receipt of the Order of the District of Columbia Court of Appeals, by regular mail, allowed Petitioner an opportunity to file a timely Petition for Rehearing.

Respondent has continued to contend that Petitioner purposely avoided receiving the certified letters sent to him; purposely

ignored notices by the postman that letters were waiting for Petitioner at the Clinton Post Office. Respondent's argument is not only extremely weak, it also casts a grim shadow over Petitioner's character, intelligence and reputation, as well as his credibility. Petitioner (1) had no idea when the Board of Zoning Adjustment would send notice of the decision in his case, (2) never saw any postal slips notifying him of certified mail (3) as an attorney, was always aware of the importance of time factors to protect his rights. Any reasonable man would realize Petitioner, as an officer of the Court himself, would not be so foolish as to ignore a notice affecting his rights, and then call the Board of Zoning Adjustment to inquire if a decision had been made. Petitioner had invested money and time in the involved property. Petitioner desired to locate his offices in the involved property. Each stage of the proceedings in the case was of utmost concern to the Petitioner

and took priority in his planning. Petitioner still maintains he never received any postal notices for the certified letters. Whether the slips were blown from Petitioner's curb-side mailbox, were placed in the wrong mail-box by the postman, were never left, or whatever took place so as to prevent Petitioner from receiving the letters is unable to be explained by Petitioner. Petitioner can only inform this Court that he certainly did nothing to avoid receiving information about the decision of the zoning of his property. That information was too important and too essential to Petitioner for him to do such a foolish act.

58 Am Jur §27 states, "Where a notice was properly mailed, its receipt will be presumed in the absence of evidence to the contrary." "This presumption may be overcome by evidence that the notice was in fact never received."

The letters sent by the Board of Zoning Adjustment to Petitioner, by certified mail,

were returned to the Board. That is evidence those letters were not received by Petitioner and he could not have known the contents. Whenever Petitioner, as an attorney, is required to serve notice on a party, and does so by certified mail, if the certified letter is returned to the Petitioner, marked "Unclaimed," he is required to send that letter again or to select another manner of effecting good service. In many instances an affidavit of mailing is necessary, which includes a copy of the signed receipt as proof that someone at that address received the letter. In Petitioner's case no one signed for any of the certified letters of the Board.

Generally, there is a presumption that mail correctly addressed, stamped and mailed was received by the party to whom it was addressed, although such a presumption is rebuttable and may be overcome by evidence that notice was never in fact received. Szezesay v. Vasquez, 71 N.J. Super. 348 (1962).

The burden of proving that a party had notice rests on the one claiming to have sent the notice. Regan v. Atlantic Refining Co., 304 Mass. 351 (1939).

The presumption that Petitioner received the letters was rebutted when the letters were returned to the Board of Zoning Adjustment. All Respondent has asserted is that Petitioner purposely avoided receipt of the letters. The burden remained on Respondent to prove that assertion. Respondent has not met that burden.

In consideration of the above-cited conflicting case-law from other jurisdictions, as well as facts unique to the instant case, there is justification for granting certiorari to review the judgment below.

2. THE DECISION OF THE COURT BELOW TO REJECT PETITIONER'S ARGUMENTS FOR GRANTING RELIEF FROM THE ZONING OF THE INVOLVED PROPERTY RAISES SIGNIFICANT AND RECURRING PROBLEMS OF ZONING ORDINANCES WHICH ARE DISCRIMINATORY IN THEIR APPLICATION AND

WHICH ARE ADMINISTERED ABSENT A RATIONAL BASIS.

The District of Columbia Board of Zoning Adjustment has ruled continually in such a way as to deny zoning relief to certain businesses in certain areas of the District of Columbia and to grant relief to similar businesses in similar areas. Those decisions are without a rational basis and without sufficient evidence to substantiate them. The District of Columbia Court of Appeals has continually upheld those decisions, allowing the Board to discriminate among the professions and to irrationally deny zoning relief where it is justified. Just prior to the decision in Petitioner's case, the Court below upheld the Board's decision to deny relief to another attorney seeking to locate a law and a real estate office on a primarily commercial strip. Michael D. Lange v. D.C Board of Zoning Adjustment, No. 13417. A history of the Board of Zoning Adjustment's rulings has been outlined in Petitioner's

Petition for Review Brief in the Court below and which is a part of the record.

This honorable Court has ruled in Nector v. Cambridge, 277 U.S. 183, that the character of the neighborhood may be taken into consideration in determining the validity of a zoning restriction. The decision to disallow Petitioner placement of a law office and a real estate office in the 4600 block of Georgia Avenue, N.W., in the District of Columbia, casts a serious doubt upon the credibility and purpose of the District of Columbia Board of Zoning Adjustment.

This honorable Supreme Court of the United States sits in the District of Columbia, making Georgia Avenue well known to it. This honorable Court can, therefore, take judicial notice of the fact that Georgia Avenue is commercial in character from beginning to end. Refusal to grant zoning relief to Petitioner is contra the decisions of high courts of

of other jurisdictions and shocks the sensibility of any reasonable man cognizant of the lay-out and design of the District of Columbia.

Jurisdictions such as Virginia, New Jersey, Maryland and South Carolina have long recognized that it is in harmony with the zoning plan to allow law offices and real estate offices to locate in residential neighborhoods; and certainly to locate on main arteries of the cities, such as Georgia Avenue.

Grimley v. Ridgewood, 45 N.J. Super. 574 (1957) concerned the granting of relief from a zoning ordinance to an attorney in New Jersey. Arguments had been set forth similar to those of Petitioner, asserting that an attorney should be able to locate an office in a neighborhood whose character had changed over the years, and which already had physicians, other businesses and a church.

Unlike Petitioner, however, the attorney

in Grimley was granted the relief by the Board of Zoning Adjustment. An appeal was taken by a neighbor contesting the Board's decision. All of the reasons, set forth by the New Jersey Appellate Division, for upholding the Board's decision are applicable to the instant case of Petitioner. The New Jersey appellate court found the following:

1. Earlier granting of a variance to permit rental of property in a two-family zone for medical offices would not be controlling as a matter of law with regard to the application for a variance to permit the use of a law office, but it would be a circumstance of some force in search for "special reasons" for granting a variance.

2. The character of the neighborhood is always an important element in zoning variance cases.

3. On the record presented it was not an abuse of discretion to grant a variance to permit the use of a property in a two-family zone for a law office.

The Board of Zoning Adjustment in the Grimley case had carefully examined the character of the neighborhood where the attorney sought to locate. It rationally established that allowing the attorney to locate would not disturb the zoning plan of the community.

In Petitioner's case, the District of Columbia Board of Zoning Adjustment failed to consider any of the factors appropriate for consideration and denied Petitioner any relief, It asserted that a law office would constitute a substantial detriment to the community and would have an adverse affect. That decision by the District of Columbia Board of Zoning adjustment appears to have been rendered after very little thought. The statement that a law office is a substantial detriment to the neighborhood is merely a rote recitation of previous zoning decisions. It is also an offensive statement to the legal profession.

The Gimley case and Petitioner's case

are so factually similar that a close comparison of the two is definitely warranted. The reading given the ordinance granting a variance by the Board of Zoning Adjustment was much too narrow by both the Board and the Court of Appeals.

Although the Court of Appeals did not decide Petitioner's case on the merits, dismissing it for lack of jurisdiction, it did comment on the merits in the opinion. The comment indicated that the Court would reject Petitioner's zoning argument because it could not be justified. The record shows plainly that Petitioner had justifiable grounds for being afforded the relief sought from the zoning. The refusal of the District of Columbia Court of Appeals to respect those facts cannot be justified.

CONCLUSION

For the reasons given above, a writ of certiorari should issue to review the judgment

and the opinion of the District of Columbia Court of Appeals.

Respectfully submitted,

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No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1980

HAL WALLS, JR.
Petitioner

v.

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
Respondent

APPENDIX

DISTRICT OF COLUMBIA
COURT OF APPEALS

District of Columbia Court of Appeals

FILED MAR 18 1980
Alexander L. Stevas
Clerk

No. 79-518 1980

HAL WALLS, JR., Petitioner,

v.

DISTRICT OF COLUMBIA BOARD
OF ZONING ADJUSTMENT,
Respondent.

Petition for Review of an Order of the
District of Columbia Board of Zoning Adjustment

(Argued January 24, 1980 Decided March 18, 1980)

Before Kelly, Kern and Harris, Associate Judges.

MEMORANDUM OPINION AND JUDGMENT

Petitioner seeks reversal of a decision by the District of Columbia Board of Zoning Adjustment (Board) denying his application for a use variance. We conclude upon review of the record that we are without jurisdiction of his petition for review. Therefore, we dismiss the petition for review.

I.

In January 1978 petitioner and his wife purchased the property at 4604 Georgia Avenue, N.W., intending to use it both as a law office and as a real estate office. Upon learning that the property was located in an R-4 District, petitioner in August 1978 filed with the Board an application for a use variance. After holding a hearing on October 25, 1978, the Board entered an order on December 8, 1978, denying petitioner's application. The Board found that:

> The residential uses of this neighborhood must be preserved and to grant this application would cause substantial detriment to the public good and substantially impair the intent, purpose and integrity of the zone plan. (Record at 37.)

The Board sent petitioner a copy of its order by certified mail, return receipt requested, on the same date it was entered. The record reflects that the Board used the address which petitioner had stated in his

variance application to be his address for purposes of notice. (Record at 1.) However, petitioner did not respond to either of the two Postal Service notices which the record reflects were left at that address, and the order sent by certified mail was ultimately returned to the Board on December 24, 1978, stamped "UNCLAIMED." (Record at 38A.) On January 4, 1979, petitioner wrote the Board a letter which (i) stated that he had not received a copy of the order until that day, after having telephoned the Board's offices requesting the information, and (ii) requested a reconsideration of the Board's denial of his application. (Record at 44, 45.)

The Board treated petitioner's January 4 letter as a motion for reconsideration, a motion which the Board denied on March 26, 1979, on grounds (i) that it was not filed within the ten-day deadline imposed by the Board's rules, and (ii) that even if the motion had been timely filed, it would be denied because it failed to state an acceptable basis of error on the part of the Board to support a motion for reconsideration.(Record at 47-48

The Board sent petitioner a copy of its March 26 order, again by certified mail, return receipt requested. Again, petitioner failed to respond to the notice left at his residence by the Postal Service after finding him not at home for personal delivery, and this order sent by certified mail was returned to the Board on April 11, 1979, marked "UNCLAIMED." (Record at 46A.)

On May 4, 1979, petitioner filed with this court his petition for review of the Board's denial of his application for a use variance. In that petition he claimed that he did not receive notice of the Board's denial of his motion for reconsideration until April 21, 1979, after he telephoned the Board's offices inquiring about his case.

II.

In urging us to reverse the Board's denial of his application for a use variance, petitioner suggests several reasons for finding that the Board abused its discretion in applying its regulations to petitioner's

case.[1] Petitioner does not, however, attempt any rebuttal to respondent's principal argument -- that petitioner failed to file his petition for review within the fifteen-day deadline imposed by Rule 15 of the rules of this court. We find this argument by respondent persuasive.

D.C.App. R. 15(b) provides in pertinent part:

> Review of orders and decisions of an agency shall be obtained by filing with the clerk of this court a petition for review within 15 days from the date of having been given formal notice of the order or decision sought to be reviewed.... . (Emphasis added.)

However, this provision for a fifteen-day deadline is subject to an exception provided in D.C.App. R 15(c):

> The running of the time for filing [a] petition for review is terminated as to all parties by the timely filing pursuant to the rules of the agency of a petition for rehearing or reconsideration and the full time for filing a petition for review as fixed by subdivision (b) of this rule commences to run and is to be computed from the date of the order denying said petition. (Emphasis added.)

Here, the running of the time for filing a petition for review in this court was never tolled by the provisions of our Rule 15(c), because petitioner's motion for reconsideration by the Board was untimely. That motion for reconsideration was governed by the Supplemental Rules of Practice and Procedure Before the Board of Zoning Adjustment. See 22 DCRR § 1, at seq. Section 5.41 of those rules give a party ten days within which to file a motion for reconsideration of a final decision by the Board. 22 DCRR § 5.41 (1972). Although § 5.41 does not explicitly state when the ten-day period begins to run, a study of the related rules indicates that that period begins running when the Board serves formal notice of an order on the party seeking reconsideration. See, e.g., 22 DCRR §§ 5.211, 5.44 (1972). Here, petitioner was served formal notice on December 8, 1978, when the Board sent him its order by certified mail, properly stamped and addressed. Petitioner waited over four weeks to request reconsideration of that order.

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1 Specifically, he claims that the Board's denial of his application (1) has no rational basis, (2) offends the principles of equal protection of the laws, and (3) is inconsistent with the Board's "acquiescence" in the change of character Georgia Avenue has undergone over the years. We note that, even were we to find that this court had jurisdiction of this case, we would reject these arguments, since the decision of the Board had support in the record and clearly lay within the Board's broad discretion in applying the zoning regulations.

Since the fifteen-day period allowed by Rule 15(b) was never tolled by a timely petition for reconsideration, it expired long before May 4, when petitioner filed with this court his petition for review. Therefore, this court has no jurisdiction to review the Board's order and must dismiss this petition for review.

PER CURIAM

FOR THE COURT:

Alexander L. Stevas

Alexander L. Stevas, Clerk.

Copies to:

Clerk, Superior Court of the District of Columbia

Hal Walls, Jr.
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Richard W. Barton, Esquire
Deputy Corporation Counsel

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2 In Valentine v. Real Estate Commission, D.C.App., 163 A.2d 554, 556 (1960), this court ruled that where the petition for review was filed late, even by one day, "we have no discretion except to dismiss the appeal." See also In re C.I.T. and C.M.T., D.C.App., 369 A.2d 171, 172 (1977).

District of Columbia
Court of Appeals

No. 79-518

HAL WALLS, JR., Petitioner,

v.

DISTRICT OF COLUMBIA BOARD
OF ZONING ADJUSTMENT, Respondent.

BEFORE: Kelly, Kern, and Harris, Associate Judges.

O R D E R

On consideration of petitioner's petition for rehearing, it is

ORDERED that petitioner's petition be denied.

PER CURIAM

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